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In the Supreme Court of the United States

OCTOBER TERM 1947

THOMAS W. FONG, JAMES LEE HING, and JOSEPH BAUER,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, HONORABLE J. T. RONALD, Judge,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

– and –

BRIEF IN SUPPORT OF PETITION

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To the Honorable, The Supreme Court of the United States:

Thomas W. Fong, James Lee Hing, and Joseph Bauer, petitioners herein, pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Washington, affirming the order of the respondent judge of the Superior Court of the State of Washington for King County, which had denied petitioners' "Petition for Return to Defendants of Personal Property Seized and Taken from Defendants in Violation of Their Constitutional Rights."

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This case involves the constitutionality under the Fourteenth Amendment to the Federal Constitution of

a search and seizure made by Seattle police officers. Certain personal property was seized by the officers from petitioners as a result of a search of the persons and the dwelling place of the petitioners. The petition for the return of that personal property has been denied.

It is admitted: (1) that the search was conducted without a search warrant, (2) that petitioners were arrested without a warrant, (3) that no complaint or charge had been filed against them at the time of the arrest, (4) and that no crime was committed by petitioners in the presence of the officers.

The basis relied upon below, and upon which the State Supreme Court relied, in denying the petition for the return of the property, was that the search and seizure were incident to lawful arrest. The circumstances of the arrests and the sequence of events relating to the search and seizure, which are set out fully in the brief accompanying this petition, show conclusively that the arrests were illegal and the search and seizure were in violation of petitioners' rights under the Fourteenth Amendment to the Federal Constitution.

Petitioners now stand charged in the Superior Court of the State of Washington for King County with a burglary alleged to have been committed on May 22, 1947, which burglary had not even yet been reported to the police at the time when the illegal arrests and unconstitutional search and seizure took place.

Petitioners filed in the King County Superior Court a petition entitled "Petition for Return to Defendants of Personal Property Seized and Taken from Defend-

ants in Violation of Their Constitutional Rights" (R. 1).

An answer and return to said petition were filed, a hearing was had, and the petition was denied (R. 2).

Department No. 2 of The Supreme Court of the State of Washington affirmed the denial (R. 16, 129 Wash. Dec. 557). A rehearing before the State Supreme Court, sitting *en banc*, was denied with two justices dissenting, and judgment was entered (R. 29, 130 Wash. Dec. 145). This Writ is sought to review the judgment of the State Supreme Court.

Petitioners also presented to the King County Superior Court a separate "Motion to Suppress" the articles of personal property as evidence. Said motion was denied also, but that being an interlocutory order, no review is sought of that denial.

JURISDICTION

1. Jurisdiction of this court is sustained by Judicial Code, section 237 (b), as amended by Act of February 13, 1925, c.229, sec. 1, 43 Stat. 937, being 28 U.S.C.A. sec. 344 (b).

2. Review is sought under Rule 38, 5 (a), Rules of this Court. The federal question of substance which has been decided by the state court is that the search and seizure here involved did not violate the rights of petitioners under the Fourteenth Amendment to the Federal Constitution. That decision by the Supreme Court of the State of Washington is not in accord with applicable decisions of this Court. *United States v. Di Re*, Jan. 5, 1948, 332 U.S. 581, 68 S. Ct. 222, 92 L. ed. 218, and *Johnson v. United States*, Feb. 2, 1948,

333 U.S. 10, 68 S. Ct. 367, 92 L. ed. 323, hold a search and seizure such as this to be unconstitutional under the Fourth Amendment to the Federal Constitution. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" which is specifically protected against action by the federal government under the Fourth Amendment to the Federal Constitution, is a right so basic and substantial and of such importance to free individuals under our system of government, that it is protected from abridgment by action of a State under the Fourteenth Amendment to the Federal Constitution. *Reeve v. Howe*, 33 F. Supp. 619; *Hague v. C.I.O.*, 101 F.(2d) 774. See *Gouled v. United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. ed. 647, and *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. ed. 288.

The State Supreme Court in its opinion (R. 16) recognized the applicability of the federal constitutional limitation but nevertheless held directly contrary to the decisions of this court. The question whether or not any protection against unreasonable searches and seizures is afforded by the Fourteenth Amendment against State action is nevertheless directly involved. That is a substantial federal question which has never been passed upon directly by this court. In *Hague v. C.I.O.*, 307 U.S. 496 at p. 517, 59 S. Ct. 954, 83 L. ed. 1423, this court specifically stated that it was not passing upon the question. In *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. ed. 218, the arrest was by city police officers, but the applicability of the Fourteenth Amendment was not di-

rectly involved since the trial was in federal court for an offense against federal law. A writ of certiorari should be granted herein so that this question may be determined.

3. The judgment of the Supreme Court of the State of Washington was entered March 9, 1948, the order denying petition for rehearing having been filed March 8, 1948. This petition is presented prior to June 8, 1948.

4. The federal question was timely raised and passed upon. The original petition itself in the King County Superior Court showed by its title that it raised the claim of constitutional rights (R. 1, Par. III, admitted in Answer, R. 10, Par. III). The Petition for Writ of Review in the State Supreme Court also raised the question of rights under the Federal Constitution (R. 1, Par. III; R. 7, Par. XVI). The Judgment of the State Supreme Court (R. 36) affirming the lower court's order denying the petition necessarily denies petitioners' claim of constitutional right. The opinion of the Supreme Court of the State of Washington, 129 Wash. Dec. 557, states that petitioners urged the federal constitutional point (R. 21), although the opinion erroneously and inadvertently refers to the Fourth Amendment to the Federal Constitution which could in no event be applicable in this case, except as carried through as a limitation on state action under the Fourteenth Amendment. Since the opinion states that the binding effect of the constitutional mandates is not disputed and since the court goes on to consider the legality of these arrests and this search and seizure in the light thereof, the State Supreme

Court necessarily was considering the Fourteenth Amendment to the Federal Constitution. The certification by the Supreme Court of Washington (R. 37) removes any possible doubt that petitioners' rights under the Fourteenth Amendment to the Federal Constitution were timely raised and were passed upon by the State Supreme Court. Petitioners' petition for rehearing again urged the protection of the Fourteenth Amendment (R. 25). The additional authorities urged upon the court involved federal constitutional cases (R. 27 and 28). The petition for rehearing was denied with a dissenting opinion by two justices based specifically on the constitutional questions (R. 29).

5. The Judgment of which review is sought is a final judgment of the Supreme Court of Washington. Such a separate petition for the return of property is independent of and is not ancillary to any criminal proceedings. *Dowling v. Collins*, 10 F.(2d) 62, specifically approved in *Cogen v. U.S.*, 278 U.S. 221, 49 S. Ct. 118, 73 L. ed. 275. The petition was presented to the King County Superior Court separately from the motion to suppress evidence (R. 1, Par. III; R. 2, Par. IV); an Answer and Return was filed in the trial court and a hearing had thereon (R. 2). The said Superior Court entered two separate orders, one denying the petition for return of property and another denying the motion to suppress evidence (R. 34). The petition for return of property has at all stages of the proceedings stood on its own feet and has been treated independently of the motion in the criminal case. The State Supreme Court, by reviewing the matter, recog-

nized that the denial of this independent petition for the return of property was a final judgment.

QUESTIONS PRESENTED

1. Whether the search and seizure in this case made without a warrant violated the constitutional rights of petitioners?

2. Whether the Fourteenth Amendment to the Federal Constitution affords any protection against unreasonable searches and seizures.

REASONS RELIED ON FOR THE ALLOWANCE ON THE WRIT

The facts shown by the record as set out in the accompanying brief show that the search and seizure in this case was unconstitutional under applicable decisions of this Court. The State Supreme Court assumed the federal constitutional restriction against unreasonable searches and seizures to be applicable to the facts of this case. By refusing to order a return of the property, the State Supreme Court has flaunted the recent decisions of this court and refused to follow them.

Petitioners are entitled to the protection afforded by the Federal Constitution.

Petioners have urged and feel strongly that the Fourteenth Amendment to the Federal Constitution protects them against this unreasonable search and seizure. The right of every person to be secure from such an invasion of his person and his home is fundamental to our form of government. This court has never squarely decided whether or not the Fourteenth

Amendment to the Federal Constitution affords any protection against action by the States in this regard.

It is respectfully submitted that the Writ of Certiorari should be issued so that this Court may decide this important question.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is reported in 129 Wash. Dec. 557 (R. 16). The order denying rehearing is reported in 130 Wash. Dec. 145; two justices joined in a dissenting opinion (R. 29).

II.

JURISDICTION

Jurisdiction is fully covered in the foregoing petition and that section is adopted here by reference.

III.

STATEMENT OF THE CASE

A concise statement of the case is contained in the preceding Petition under the heading "Summary and Short Statement of Matter Involved" and is here adopted by reference.

The sequence of events at the time of the arrests and the search and seizure are important in showing that the decision below is contrary to the applicable decisions of this court.

The officers claimed that they had information which led them to believe that petitioner Thomas W. Fong had participated in a burglary in Seattle, Washington, in January of 1947. The record is entirely barren of any evidence showing that they had any reason to believe that the other two petitioners, James Lee Hing or Joseph Bauer, had any connection with the January 1947 burglary. The arrests were on May 23, 1947, before the officers had any knowledge of an alleged burglary of May 22, 1947, with which petitions are now charged.

Officer Griffin testified that he arrested petitioner James Lee Hing solely because he was registered under an assumed name and when he discovered that Hing was associating with Fong:

> "Q. When was the first day you received information that Hing and Fong were associating together?
>
> A. The 23rd day of May, 1947 (the day of the arrest).

Q. And that night you arrested Hing because he was with Fong?

A. That is right." (Parenthetical matter supplied) (R. 103).

Upon the officer's own testimony, the arrest of Hing was clearly illegal.

Officer Mahoney testified that after Hing was arrested he saw petitioner Joseph Bauer try to put something down the toilet and arrested him *after* his search disclosed that what Bauer was trying to dispose of was two guns. He had no other reason for the arrest:

"Q. What overt act did you see Bauer commit before you arrested him?

A. I didn't see him commit any act other than throw the guns in the toilet.

Q. You didn't know when the guns were wrapped in this paper, you didn't know until after you reached down and pulled the package up to determine, that there were guns there?

A. That is right.

Q. At the time that you discovered that, determined that these guns were in the package, you arrested Bauer?

A. If he didn't have any guns in that package there wasn't any reason to arrest him.

Q. Do you tell me that was one reason?

A. That is why I arrested him." (R. 123 and 124)

The officers then searched the premises, and petitioner Thomas W. Fong was not arrested until *after* the search. Officer Griffin set this forth as follows in an affidavit:

> "That after the arrests of the defendants Hing and Bauer, affiant and Mahoney *conducted a search of the said cabin* and seized a brief case, a bunch of keys and some other articles of evidence; that *shortly thereafter* Thomas W. Fong entered the cabin and was notified that he was under arrest." (Italics supplied) (R. 57)

The above facts testified to by the officers are substantially the same as set forth by petitioners in their affidavits (R. 43).

The State Supreme Court failed to treat these three petitioners as individuals. The arrests and the search and seizure were upheld as though all of the arrests were made first and the search and seizure followed, and as though there was one common basis for the arrest of all three petitioners.

One of petitioners' chief complaints herein, is that the State Supreme Court based its decision upon assumptions that are contrary to the facts clearly appearing in the record. The above-quoted testimony and affidavits as to the sequence of events at the time of the arrests and search and seizure were ignored by the State Supreme Court. The opinion of that court shows that it was based on assumptions, contrary to the record, that all three petitioners were arrested under identical circumstances and stand in identical legal positions. This court has held that persons arrested together are entitled to individual treatment. *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. ed. 218. And when the procedure of a state court and of state officials abridges petitioners' constitutional rights, this court will analyze

the facts as to what really took place. *Haley v. Ohio*, 332 U.S. 596, 68 S. Ct. 302, 92 L. ed. 239.

IV.

SPECIFICATIONS OF ERROR

1. The State Supreme Court erred in holding that the arrest of petitioner Hing was legal when it was based solely on his associating with Fong.

2. The State Supreme Court erred in holding that the subsequent arrests of petitioners Bauer and Fong validated the illegal search made before they were arrested.

V.

SUMMARY OF ARGUMENT

A. The arrests were illegal and the search and seizure unconstitutional. This substantial question has been decided contrary to the decisions of this Court.

B. The Fourteenth Amendment to the Federal Constitution protects from abridgement by State action the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

C. The federal question was raised in a timely manner, was passed on by the court below, and is properly reviewable.

D. The judgment of the State Supreme Court is final.

VI.

ARGUMENT

A. The arrests were illegal and the search and seizure unconstitutional. This substantial question has been decided contrary to the decisions of this Court.

This Court has consistently held that the protection against unreasonable searches and seizures should be extended and not curtailed. The two recent cases of *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. ed. 218 and *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. ed. 323, are in point.

This search and seizure without a warrant can be legal and constitutional only if it was after a legal arrest and incident thereto.

The arrest of petitioner Hing because he was associating with petitioner Fong is directly controlled by *United States v. Di Re, supra*, wherein it was held such associating did not justify an arrest. The arrests of the other two petitioners *after* the search was made cannot validate the search and seizure which was made before the arrest. The fact that reasonable grounds for arrest may appear *after* the search, was specifically held by this court in both of the recent cases cited above, to provide no justification for the search and seizure already made. The arrest of petitioner Fong, on the basis of suspicions of police officers, was not based on probable cause so as to justify his arrest without a warrant. This search and seizure, not being incident to lawful arrests, was unconstitutional.

Granted that the legality of an arrest is to be de-

termined by the state law, still the action of the state officers as approved by the State Supreme Court deprived petitioners of their constitutional rights. This is succinctly pointed out, with citation of authority both from this Court and the law of the State of Washington, in the dissenting opinion upon the order denying petition for rehearing (R. 29). The argument and authority in that dissenting opinion are adopted here.

B. The Fourteenth Amendment to the Federal Constitution protects from abridgment by State action the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

The rights here under discussion are fundamental in a free country. A free people could not exist without such rights. Accordingly they are rights protected by both the due process and the privileges and immunities clauses of the Fourteenth Amendment to the Federal Constitution.

This Court has recognized that the test of whether a right is protected under the Fourteenth Amendment is whether or not the right is basic and essential. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. ed. 288. And this Court has always recognized that freedom from unreasonable searches and seizures is a basic and fundamental right in our society of free people.

Johnson v. U.S., 333 U.S. 10, 68 S. Ct. 367, 92 L. ed. 323:

"Any other rule would undermine 'the right

> of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law."

United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. ed. 218:

> "But the forefathers, after consulting the lessons of history, designed our constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

Gouled v. United States, 225 U.S. 298, 302, 303, 41 S. Ct. 261, 263, 65 L. ed. 647, said as follows in reference to the rights under the Fourth and Fifth Amendments:

> "That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded as the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen — the right to trial by jury, to the writ of *habeas corpus*, and to due process of law."

This Court has of course held that the Fourth Amendment is in itself no limitation on state action. It has never passed upon the applicability of the Fourteenth Amendment to the same basic rights which are protected by the Fourth Amendment from abridgment by the Federal Government. However, lower federal courts have held directly that the Four-

teenth Amendment does protect these very rights here in question.

Reeve v. Howe, 33 F. Supp. 619:

> "As has been said by a high authority, no good reason exists why the right to be free from unreasonable search and seizure should not stand upon a parity today with freedom of religion, of speech, of the press and of assembly, as guaranteed by the Bill of Rights, inasmuch as all of these rights are of equal importance to the individual (*Hague v. Committee, etc.*, 3 Cir., 101 F.(2d) 774, 787, per Biggs, C.J.). Protected from abridgment by the Federal Government by the First and Fourth Amendment, they are protected from abridgment by the States by the Fourteenth Amendment. 101 F.(2d) at page 788, citing *Colgate v. Harvey*, 296 U.S. 404, 428, 56 S. Ct. 252, 80 L. ed. 299, 102 A.L.R. 54."

Hague v. C.I.O., 101 F.(2d) 774, 781:

> "The Fourth Amendment to the Constitution of the United States provides, 'the right of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, * * *.' The right so protected is a fundamental civil right and in our opinion is a privilege of Federal citizenship. As such it is secured against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment as well as by the due process clause of that Amendment."

Furthermore, there is involved here a direct taking of petitioners' property without due process of law. True, the primary and fundamental right of peti-

tioners which has been abridged is their right to personal security from invasion of their privacy and their homes. But this illegal invasion of petitioners' rights resulted in the taking of their property in this case. It is the return of that property which is sought in this action. There can be no question that the taking of petitioners' property without due process of law is directly contrary to the Fourteenth Amendment.

C. The federal question was raised in a timely manner, was passed on by the court below and is properly reviewable.

The manner in which the federal question was raised and passed upon is set forth in the foregoing petition.

This jurisdictional requirement is fully answered here by the fact that the State Supreme Court passed upon the federal question and treated it as properly raised (R. 21 and R. 37). This Court has held that the State Supreme Court considering and ruling on the question supports jurisdiction even if the federal question had not been raised at all in the trial court. *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L. ed. 926, 74 A.L.R. 701. And this is true even if the federal constitutional question were raised for the first time upon petition for rehearing. *G.N. Ry. v. Sunburst Oil Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360, 85 A.L.R. 254.

D. The judgment of the State Supreme Court is final.

The petition for the return of property is in effect an action independent from the criminal case. It was

tried out as a distinct lawsuit and was handled at every stage separately and distinctly from the ancillary and interlocutory motion to suppress evidence. The property involved is: a brown coat and pants, a pair of brown oxfords, a brief case and contents, a letter from Muriel Lee Hing, a keyring and bunch of keys, two metal pipe cleaners, one shaving outfit, two guns, and $4,280 in currency (R. 20).

The state has made no claim, nor could they possibly do so, that the above property is the fruits of the crime or the means of committing the crime with which petitioners are charged. The crime charged is a burglary in which the loot was primarly silver (R. 111). The weapons cannot possibly be instruments of such a crime of stealth.

The petitioners as owners of this property have, independently of any criminal charge, taken legal steps to have it returned to them. The money, in particular, they need at this time. It would not serve their purposes merely to have the evidence suppressed. Hence, this independent petition for return to the owners of property taken in violation of constitutional rights.

Dowling v. Collins (C.C.A. 6) 10 F.(2d) 62, certiorari denied, 270 U.S. 660, 46 S. Ct. 356, 70 L. ed. 786:

> "The preliminary motion to suppress the use thereafter in that pending criminal case of certain evidence charged to have been illegally obtained is distinct and separate from the motion for the return of the goods charged to have been illegally seized; by joining them together

the order denying the return of the goods is no less final, because the order denying the suppression of their use as evidence may be interlocutory.

"The parties, moreover, had a choice of remedies between the present proceedings and the motion in the criminal case for a return of the goods. They chose the latter; they submitted the issues thereon to the trial judge; on the merits they were denied the relief sought in the first instance, and were deemed barred thereby in the second attempt. That second action was final; and if the first motion can be deemed by agreement of the parties to have included the return of the property, there order thereon was likewise final.

"The reasoning of the opinion in *Perlman v. U.S.*, 247 U.S. 7, 38 S. Ct. 417, 62 L. ed. 950, as well as in *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. ed. 1048, 13 A.L.R. 1159, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essentional part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau* cases."

Cogen v. U.S., 278 U.S. 221, 49 S. Ct. 118, 73 L. ed. 275:

"Motions for the return of papers and the suppression of evidence made in the cause in advance of trial, under this rule of practice, must be differentiated from independent proceedings brought for a similar purpose. Where the pro-

ceeding is a plenary one, like the bill in equity in *Dowling v. Collins* (C.C.A.) 10 F.(2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution."

Respectfully submitted,

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